STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On its Own Motion	)	
	)	No. 00-0586
Adoption of 83 Illinois Administrative Code 550, Non-Discrimination in Affiliate Transactions for Gas Utilities.	)	

Nicor Gas'
Reply to Exceptions

Northern Illinois Gas Company d/b/a Nicor Gas ("Nicor Gas" or "Company") hereby submits its Reply to Exceptions to the Hearing Examiner's Proposed Order ("HEPO") in this proceeding. This Reply responds to the Briefs on Exception filed by The Peoples Gas Light & Coke Company and North Shore Gas Company ("PGNS"), Illinois Power Company ("Illinois Power"), Staff, Blackhawk Energy Services ("Blackhawk"), the Citizens Utility Board and the Cook County State's Attorney's Office ("CUB/Cook"), the Attorney General ("AG"), and the Northern Illinois Chapter of the Air Conditioning Contractors of America ("NIACCA"). This Reply to Exceptions addresses four contested issues raised in the Briefs on Exception: (1) the scope of the restriction on joint marketing and advertising between a gas utility and its affiliates, (2) the joint use of a name and logo by a gas utility and its affiliates, (3) access to the logs required by Section 550.140 (c), and (4) Staff's Motion to Strike.

I. The HEPO's Position on Joint Marketing and Advertising is Proper and Should Not be Modified.

In their Briefs on Exception, Staff, CUB/Cook, the AG, Staff, and NIACCA ("Consumer Commenters") reiterate their arguments in favor of a broad prohibition on all joint marketing and advertising between gas utilities and their affiliates. For the most part, these arguments do not raise any new issues, and provide no basis for changing the HEPO's conclusion that the gas affiliate rules should mirror those approved by the Commission for electric utilities and their affiliates. However, several points raised by these parties require further comment.

First, in arguing for a broader ban on joint marketing and advertising for natural gas utilities than for electric utilities, Staff and the Consumer Commenters utterly ignore the legal standards that govern the Commission. Specifically, if the Commission were to change its policy on joint marketing – either from the narrower rule recently imposed on electric utilities or from its longstanding policy of permitting gas utilities to engage in joint advertising – it would have to provide, at a minimum, a reasoned basis for doing so.[1/] Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 852 (1970); Chemetco, Inc. v. Pollution Control Bd., 140 Ill. App. 3d 283, 289, 488 N.E.2d 639, 643 (5th Dist. 1986).

The narrowly tailored restriction on joint marketing and advertising between an electric utility and its affiliates in competition with ARES imposed by the Commission in the electric rulemaking proceeding was based on an evidentiary record. There is, however, no evidentiary record in this proceeding. It would be plainly contrary to the requirements of governing case law (not to mention unfair and unreasonable) to premise a more restrictive gas affiliate advertising rule on the wholly unsupported assertions, erroneous statements, and speculative and conclusory allegations of competitive harm to HVAC contractors that have been presented by

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[1/] For this reason, NIACCA's reliance on the fact that Commission decisions are not res judicata is inapposite. NIACCA Br. on Exceptions, p. 9.

Staff and the Consumer Commenters in this case. See, e.g., Staff Br. on Exceptions, pp. 9-11; NIACCA Br. on Exceptions, p. 19.

Second, the efforts by the Consumer Commenters to distinguish the natural gas and electric industries on the ground that natural gas affiliates sell, repair and maintain appliances that use the utility's product is baseless. See, e.g., NIACCA Br. on Exceptions, pp. 11-12. As even NIACCA admits, electric utilities in Illinois also own HVAC affiliates, which obviously sell, repair and maintain appliances that use electricity. See NIACCA Br. on Exceptions, p. 14. Moreover, regardless of whether any specific Illinois electric utility had HVAC affiliates on the date the electric affiliate rule was adopted, NIACCA underestimates the foresight of the Commission in arguing that the Commission could not have contemplated that electric utilities would ever jointly market or advertise with affiliates other than ARES. See NIACCA Br. on Exceptions at 14) .

Third, NIACCA's complaint that the HEPO would place its members at a competitive disadvantage as compared to gas utility HVAC affiliates because NIACCA members have no similar joint marketing and joint advertising opportunities is inaccurate. See NIACCA Br. on Exceptions, pp. 4-5, 8-9. As the Commission is aware, Nicor Gas has voluntarily opened its service area to retail gas competition at all levels, and affiliates of HVAC contractors are free to sell natural gas. If NIACCA believes that joint marketing and advertising with a natural gas supplier would offer competitive benefits, its members can affiliate with or become natural gas suppliers and take advantage of their own opportunities for joint marketing and advertising.

Fourth, the arguments of Staff and the Consumer Commenters in support of a total ban on joint advertising and marketing fail to acknowledge that regulation of the relationship between a gas utility and its HVAC affiliate is far beyond the scope of the rulemaking contemplated by the Commission's Order of August 29, 2000 ("Order") initiating this proceeding. The Order, which is based on Staff's Report of August 8, 2000 ("Report"), specifically addresses the concern that preferential treatment of affiliates could "lessen the benefits to consumers of *unbundled gas services*." Order, Slip op. at 1; Report at 1 (emphasis added). The Report itself could not be more plain that the purpose of the proposed rules is to address the potential for discrimination arising out of expansion of unbundling in the gas industry:

> "The unbundling of gas service in Illinois provides consumers with access to competitive supply markets, but does not alter the monopoly character of a gas utility's distribution function. *Non-discrimination rules are needed to prevent gas utilities from using their continuing control over the distribution function to discriminate against unaffiliated marketers or their customers.*"

Report at 2 (emphasis added). Competition between gas utilities and HVAC contractors has nothing to do with unbundling in the gas industry, and consequently far exceeds the scope of the Order initiating this rulemaking proceeding.

Fifth, the arguments of Staff and the Consumer Commenters in support of a total ban on joint advertising and marketing ignore the Constitutional first amendment protection afforded commercial speech. As explained by the appellate court in its review of the electric utility affiliate rules, advertising is constitutionally protected commercial speech. Illinois Power Co. v. Commerce Comm'n, 316 Ill. App. 3d 254, 259-61, 736 N.E.2d 196, 201-02 (5th Dist. 2000). Thus, even assuming, *arguendo*, that the State has a substantial interest in regulating joint advertising between a gas utility and its affiliates, the rule must directly advance the governmental interest asserted and cannot be more extensive than required to serve that interest. See id.

In this case, the only interest asserted by the Commission in its initiating order is an interest in avoiding discrimination by monopoly providers of gas transportation services for the benefit of affiliated gas marketers operating in the unbundled gas market. Order, Slip op. at 1. Regulation of joint advertising with HVAC (and other non-gas supply) affiliates clearly would not advance the interest in non-discrimination in the gas supply market asserted by the Commission, and would be broader than necessary to advance that interest.

In Illinois Power, the appellate court analyzed Section 450.25(a), which permits electric utilities to jointly advertise with any affiliate except an affiliate in competition with an ARES. The court found that a prohibition on joint advertising between an electric utility and its electric supply affiliates directly advanced the state's interest in developing a competitive, unbundled electricity market and was no more extensive than necessary. Illinois Power, 316 Ill. App. 3d at 260-61, 736 N.E.2d at 202. Consequently, Nicor Gas believes that the prohibition on joint marketing and advertising for gas utilities adopted in the HEPO, which mirrors that of the electric rule, would likely pass constitutional muster, assuming, arguendo, that a court would find that the state has a substantial interest in regulating joint advertising between a gas utility and its affiliated gas suppliers despite the lack of any legislative directive to that effect.

Sixth, in their concern over anecdotal complaints of competitive harm by HVAC contractors, Staff and the Consumer Commenters totally fail to address the fact that a complete ban on joint advertising and marketing between gas utilities and their affiliates would create a serious competitive imbalance between gas and electric utilities and their affiliates. This result would be directly contrary to the Commission's stated intent in initiating this rulemaking proceeding. Indeed, in its Order, the Commission specifically noted that the "increasing competition between marketing affiliates of gas and electric utilities increases the need for similar treatment [of] affiliate relationships in the two industries. Order, Slip op. at 1; see also Report at 2.

Adoption of a total ban on joint marketing and advertising by gas utilities and their affiliates in this proceeding would result in widely disparate treatment of electric and gas utilities (and their affiliates) by the Commission. For example, if the Commission were to adopt a ban on all joint advertising by gas utilities and their affiliates, then electric utilities could jointly advertise with their affiliated retail gas marketers, while gas utilities would be prohibited from jointly advertising with their affiliated electric marketers. And electric utilities could jointly advertise with their HVAC affiliates, while gas utilities could not do so. This result would be unfair, unsupported, and directly contrary to the Commission's intent in initiating this proceeding.

In light of the Commission's narrow rulemaking authority over gas affiliate transactions (see Nicor Gas Rebuttal Comments, pp. 13-16), the limited scope it specified in initiating this proceeding, its expressed intent to afford similar treatment to gas and electric affiliates in the competitive retail energy market, the constitutional constraints on regulation of commercial speech, the Commission's past practice on this issue with respect to both gas and electric utilities, and the absence of an evidentiary record in this case, the HEPO's conclusion that the restriction on joint advertising and marketing for gas utilities should mirror the electric rule is lawful, fair and reasonable, and should not be changed.

II. The HEPO's Positions on Use of Corporate Names and Logos and Disclosure Statements are Proper and Should Not be Modified.

In their Briefs on Exception, the Consumer Commenters continue to advocate a total ban on the joint use of corporate names and logos by gas utility affiliates. Their arguments are not new, and were properly rejected in the HEPO.

First, CUB/Cook's effort to turn this rulemaking issue into a referendum on Nicor Gas' Customer Select Pilot Program is improper and baseless, and should be rejected. See CUB/Cook Br. on Exception, pp. 2-6. CUB/Cook continue to point to Nicor Energy's 93% residential market share in Nicor Gas' Customer Select Pilot to argue that use of a utility's name or logo by an unregulated affiliate creates customer confusion. CUB/Cook Br. on Exceptions, p. 3. This attempt to import selected pieces of evidence which they believe to be favorable to their argument from the Nicor Gas Customer Select proceeding, Docket Nos. 00-0620 and 00-0621, is misleading, improper, and should be rejected. In the first place, a review of the entire record in Docket Nos. 00-0620 and 00-0621 demonstrates that there is virtually no evidence of customer confusion in the Customer Select Pilot program. Of the 114,000 customers served under the program, and the 440,000 customers eligible to be served, only two customer complaints of possible confusion have been identified – the same two complaints attached to the AG's initial comments in this proceeding. Further, contrary to CUB/Cook's "confusion theory," the evidence in the Customer Select proceeding demonstrates that customers intentionally selected Nicor Energy, and that it was far and away the most actively marketed supplier. See Alexander Direct Testimony in Docket Nos. 00-0620 and 00-0621, p. 12, lines 10-11, attached to CUB/Cook Initial Comments.

Moreover, CUB/Cook's focus on alleged customer confusion ignores the fact that isolated anecdotes of a few instances of purported customer confusion at the inception of competition should not be used by the Commission as the litmus test of regulation. In short, experience with the Company's Customer Select Pilot program provides no basis for imposing a ban on the joint use of corporate names and logos or for imposition of disclosure requirements.

Second, CUB/Cook's argument that use of a common name or logo creates competitive advantages for gas utilities should be rejected. See CUB/Cook Br. on Exceptions, p. 3 . Even if this claim were true, it would not be a valid basis for prohibiting their use. In Illinois, the value of a corporate name or logo is a shareholder, not a ratepayer, asset. In fact, under Section 9-225 of the Act, 220 ILCS 5/9-225, utilities are specifically precluded from recovering through their rates the costs of good will advertising – that is, the costs of creating and promoting value associated with the name or logo. Instead, those costs are borne solely by the utilities' shareholders. See also People of Cook County, Docket Nos. 98-0013 and 98-0035, Slip op. at 10 (Sept. 14, 1998).

Moreover, the reputation associated with a utility name and logo depends entirely on customers' experiences with the utility. Those reputations are earned by the utility, and may or may not be favorable. Logically, the only way that use of a utility name and logo would benefit an affiliate is if the utility has earned a good reputation with consumers. It strains credulity to argue that a utility and its affiliates should be penalized for achieving such a positive result.

Similarly, Staff's assertion that sharing of corporate names and logos should be considered an attempt by utility affiliates to capitalize on the trust in gas utilities that is allegedly "founded upon the regulatory authority that the Commission exercises over gas utilities" is, at most, half of the story. See Staff Br. on Exceptions, p. 14. In fact, it is equally or even more likely that it is a reasonable means of benefitting from the utility's own positive reputation for service.[2]

Third, the parties advocating a ban on the use of common corporate names and logos ignore the confusion that adoption of their position would generate. In fact, preventing a gas utility affiliate from using the name or logo of its parent or utility affiliate would, in fact, be deceptive, and that result certainly cannot be rationalized in the name of consumer protection. As the Commission explained in adopting Section 450.25(b) of the electric affiliate rules:

> [T]he Commission believes it would be doing a tremendous disservice to consumers by essentially requiring affiliated interests in competition with ARES to masquerade as non-affiliated entities, when they are in fact affiliated.

People of Cook County, Docket Nos. 98-0013 and 98-0035, Slip op. at 10 (Sept. 14, 1998). The Consumer Commenters have not shown why this concern is not equally valid with respect to gas utilities.

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[2] The opportunity for a utility's shareholders to benefit from the positive reputation earned by the utility for its low prices and high quality customer service illustrates the fallacy in CUB/Cook's gratuitous comment (Br. on Exceptions at 3) that utilities act in the best interests of the shareholders and not consumers. Nicor Gas strongly believes that the interests of shareholders and consumers are compatible, and that both must be protected. For example, the Company's voluntary unbundling of gas supply works to the benefit of both shareholders and consumers. Nicor Gas' margin is essentially unchanged, whether or not it supplies gas, because it does not earn a profit on gas sales. The lower commodity price of gas available through unbundling and competition benefits consumers, and generates greater throughput, which benefits shareholders through increased profits. Moreover, the Company's incentive compensation plans, which were carefully reviewed by the Commission in the Company's last general rate case, are designed to motivate employees to protect the interests of the utility and its customers, not unregulated affiliates. Cf., Northern Illinois Gas Co., Docket No.95-0219 (April 3, 1996).

Fourth, as CUB/Cook's Brief on Exceptions (p. 5) appears to admit, a restriction on joint use of a corporate name or logo would constitute an impermissible restraint on commercial speech. Federal courts have specifically held that utilities have protected First Amendment commercial speech rights in trade names. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U. S. 557, 100 S. Ct. 2343 (1980); Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F. 3d 87, 96-97 (2d Cir. 1998). Consequently, the Commission cannot lawfully abridge utilities' First Amendment rights by proscribing the use of joint names or logos.

Moreover, in upholding the constitutionality of the Commission's restriction on joint marketing between an electric utility and an affiliate in competition with ARES, the appellate court noted that the restriction is sufficiently narrowly tailored because, among other things, it does allow affiliated ARES to use the utilities' corporate name and logo. Illinois Power, 316 Ill. App. 3d at 261, 736 N.E.2d at 202. Consequently, while any ban on the use by an affiliate of the corporate name or logo would exceed the permissible scope of regulation of commercial speech under federal case law, a total ban on the use of the corporate name by all utility affiliates, as the Consumer Commenters advocate, would unequivocally run afoul of the First Amendment's protection of commercial speech, and could, under Illinois Power, undermine the restriction on joint marketing and advertising contained in the HEPO itself.[3/]

Fifth, in their Briefs on Exception, the Consumer Commenters fail to address the fact that imposition of a ban on use of a utility name or logo by non-utility gas affiliates, when no such

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[3/] In addition, a total ban on joint use of corporate names or logos, as the Consumer Commenters advocate, would clearly exceed the scope of this rulemaking. As explained above, in the context of a proposed prohibition on all joint marketing and advertising, the Commission's Order initiating this proceeding is expressly aimed at ensuring non-discrimination in the transition to an unbundled retail gas market.

ban applies to electric utility affiliates, would seriously disadvantage gas utilities and their affiliates vis-a-vis electric utilities and their affiliates.[4] For example, under the proposals of the Consumer Commenters, a HVAC affiliate of an electric utility would be free to use the utility name and logo, while a HVAC affiliate of a gas utility would not. This situation would be patently unjust and irreconcilable with the Commission's recognition that "increasing competition between marketing affiliates of gas and electric utilities increases the need for similar treatment [of] affiliate relationships in the two industries." Order, Slip op. at 1. See also Report at 2.

Sixth, various parties have attempted to argue that a different rule regarding joint use of corporate names and logos should apply to gas utility affiliates than to electric utility affiliates because gas utility holding companies purportedly tend to use common corporate names, while electric utility holding companies allegedly do not. See, e.g., NIACCA Br. on Exceptions, p. 12; AG Br. on Exceptions, p. 7. This observation is incorrect and irrelevant for at least two reasons. First, the Commission is no doubt fully aware that utilities and their affiliates may and do change their names from time to time, and could not have been under the impression when promulgating the electric affiliate rule that electric utilities and their affiliates would never operate under common corporate names. Second, the fact that a holding company has a different name from its affiliated utility in no way guarantees that non-regulated affiliates of the utility will not share the name of the utility rather than the parent. Consequently, the attempt of Consumer

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[4] As noted below, the gas affiliate disclosure requirements advocated by Staff, Blackhawk and the Consumer Commenters would have the same effect.

Commenters to distinguish between gas and electric utilities on the issue of the joint use of corporate names and logos is without merit and should be rejected.

Nicor Gas also believes that the HEPO correctly determines that use of disclaimers would not be beneficial and could itself create customer confusion. First, as explained above, there is no valid basis in this record to impose a different rule regarding disclaimers on gas utilities than on electric utilities. In addition, none of the parties that take exception to the HEPO's conclusion regarding disclaimers address the serious concern of competitive imbalance between gas and electric utilities that would be created if the gas affiliate rule does not mirror the electric rule on this issue. Asymmetrical rules would mean, for example, that disclosures would be required by an HVAC contractor affiliated with a gas utility, but not one affiliated with an electric utility. As noted above in relation to joint marketing and the proposal to ban joint use of corporate names and logos, this result would be contrary to one of the Commission's clearly expressed objectives in initiating this rulemaking proceeding, which was to ensure similar treatment of affiliate relationships in the gas and electric industries. Order, Slip op. at 1; see also Report at 2.

Moreover, NIACCA's claim that the HEPO should have adopted an alleged "compromise" position accepting disclaimers, and failed "to recognize a concession make by the natural gas utilities," deserves special comment. See NIACCA Br. on Exceptions, pp. 15-16. Nicor Gas is not aware of any industry position in this proceeding accepting disclaimers as a "compromise," and most certainly the Company has not agreed to any such position. See, e.g., Nicor Gas Rebuttal Comments, pp. 9-13; PGNS Rebuttal Comments, pp. 3-9. NIACCA's only citation to the source of this purported compromise is page 8 of the HEPO (see NIACCA Br. on

Exceptions, p. 15), which contains no such reference. In short, NIACCA's assertion that an industry-wide gas utility compromise position exists with respect to the issue of disclaimers is baseless and should be rejected.

III. The HEPO's Position on Access to the Log <u>Required by Section 550.140 (c) Should be Clarified.</u>

In its Brief on Exceptions, the AG renews its argument that the log required by Section 550.140(c) should be made available to the public for review. As the Company has explained in its prior comments in this proceeding, no such requirement is contained in the electric affiliate rule, and there is no basis for a different result with respect to gas utilities. This log may contain highly sensitive, confidential information relating to both customers and suppliers that should not be made generally available to the public, outside the context of a complaint case. The AG's proposal that utilities prepare a redacted form of the log for public disclosure would be unduly burdensome, and no party has explained how public assess to a highly redacted log would be of any benefit. For the reasons explained in the Reply Comments of Nicor Gas (p. 6) and PGNS (pp. 10-11), the Rebuttal Comments of Nicor Gas (p. 13), and the Company's Brief on Exceptions, the AG's proposal should be rejected.

As further explained in the Briefs on Exception of Nicor Gas (pp. 2-3) and PGNS (pp. 3-5), a new paragraph should be added to the HEPO to clarify that the AG's proposal to modify Section 550.140(c) is rejected.

IV. <u>The HEPO Properly Denied Staff's Motion to Strike.</u>

In its Brief on Exceptions, Staff takes issue with the HEPO's ruling denying its Motion to Strike a statement in Nicor Gas' Initial Comments.

In denying Staff's Motion, the HEPO correctly relies on the undisputed facts that the transmittal letter attached to a Staff-updated, post-workshop draft of the rule to which the comments in this proceeding were directed was not marked confidential by Staff, while the draft of the rule itself (which was admitted into the record) was clearly designated a confidential settlement document.

As a result of inclusion of the updated rule in the record, the Company concluded that the comments it filed would be appropriate and acted accordingly. The Company did not include or refer to a number of issues discussed on a confidential basis during the workshop process, as they were not entered into the record by any party to the case. Despite Staff's claims to the contrary, the Company unequivocally supports and respects the workshop process and believes that it has acted in a manner fully consistent with that perspective in this case.

In short, the HEPO is correct in denying Staff's Motion to Strike (which is wholly unrelated, in any event, to any substantive issue in this proceeding).

V. Conclusion

For the foregoing reasons and the reasons explained in Nicor Gas' Initial, Reply, and Rebuttal Comments and its Brief on Exceptions, the Commission should adopt the HEPO subject to the three modifications proposed in the Company's Brief on Exceptions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen J. Mattson, hereby certify that a copy of the foregoing Nicor Gas' Reply To Exceptions were served upon the parties listed on the attached Service List, by e-mail and first class mail, postage prepaid on May 18, 2001.

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